"But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure."

Finally, the following words of Tindal C.J. in *Hancke* v. *Hooper*,[3] seem to me most appropriate to the present case though uttered 130 years ago:—

"A surgeon does not become an actual insurer; he is only bound to display sufficient skill and knowledge of his profession. If from some accident, or some variation in the frame of a particular individuals, an injury happens, it is not a fault in the medical man . . . The plaintiff must shew that the injury was attributable to want of skill; you are not to infer it."

The action is dismissed with costs.

Claim dismissed.

Solicitors: *H. W. Tan & George; Lovelace & Hastings; Shearn, Delamore & Co.*

BAN HUAT SENG CO. LTD. v. LEE POH SOO

[O.C.J. (Ismail Khan J.) October 8, 1966]

[Seremban — Civil Suit No. 84 of 1958]

Practice and Procedure — Judgment in default of appearance — Application to set aside — Whether there was sufficient affidavit of service — Laches — Bona fides — R.S.C., 1957, O. 9, rr. 2 and 15, O. 13, r. 2, O. 67, r. 9.

The plaintiffs had obtained judgment in default of appearance against the defendant on April 30, 1959. On January 11, 1966, the defendant applied to have the judgment set aside on the ground that there was no affidavit of service as required by O. 13, r. 2 and on the ground that he had a good defence on the merits.

Held: there was in fact an affidavit of service in this case and the court could not in this case exercise its discretion in favour of the defendant as he had been guilty of *laches* and his conduct was not *bona fide*.

Cases referred to:—

(1) *Hamp-Adams* v. *Hall* [1911] 2 K.B. 942.

(2) *MacFoy* v. *United Africa Co. Ltd.* [1961] 3 All E.R. 1169.

(3) *Craig* v. *Kanseen* [1943] 1 All E.R. 108.

(4) *Evans* v. *Bartlam* [1937] A.C. 473.

(5) *Attwood* v. *Chichester* (1878), 3 Q.B. 722.

CIVIL SUIT.

Lee Boon Peng for the plaintiffs.

Edgar Joseph Jr. for the defendant.

Cur. Adv. Vult.

Ismail Khan J.: This is an application by way of summons-in-chambers to set aside a final judgment by the plaintiffs against the defendant in default of appearance and the execution issued thereon by way of bankruptcy notice. The application was adjourned to open court for argument.

On 14th December, 1958, the plaintiffs issued a writ for the sum of $19,585.04 being the balance of the defendant's account with the plaintiffs for sums advanced to the defendant towards the purchase of rubber. Appearance not having been entered, the plaintiffs entered judgment for the said sum and costs on 30th April, 1959.

On 11th January, 1966, the defendant took out a special summons to set aside the judgment on the following grounds:—

(1) that the plaintiffs had failed to file an affidavit of service in compliance with Order 13 rule 2 of the Rules of the Supreme Court; and

(2) that such failure nullifies all subsequent proceedings in default.

Before entering final judgment, the plaintiffs had sworn and filed the following affidavit:—

"I, Tay Leong Phuan of Malayan Chinese Hokkien nationality of full age of No. 14, Jalan Tunku Hassan, Seremban, make oath and say as follows:

1. I am the managing director of BAN HUAT SENG Co. Ltd., the abovenamed plaintiffs in this Suit.

2. That my solicitors Messrs. B. Kaher Singh & Karam have been informed by the Assistant Registrar, Supreme Court, Seremban that the writ of summons in this action was served on the defendant on 3.1.59 *vide* Assistant Registrar's letter No. (2) in Civil Suit 84-58 dated 7th January 1959 referred.

3. That I understand that an affidavit of service has already been filed by the process server of this Honourable Court in the above suit after the service of the writ on the defendant.

4. That the said defendant has not entered an appearance in this suit.

5. In view of the abovementioned paragraph 4 and the existing Order 13 rule 2 of the Supreme Court Rules 1957 which says that before judgment could be signed an affidavit of service should be filed and I now pray that this affidavit may be treated as an affidavit of service in this suit and further pray that judgment against the defendant may be given."

The defendant regarded this as the affidavit which the plaintiffs had filed for the purpose of entering judgment in default. He therefore attacked it on the following grounds:—

"(1) it does not mention where, how and by whom service was effected contrary to Rules of the Supreme Court, Order 67 rule 9;

(ii) it does not mention the day on which the indorsement of service was made contrary to Rules of the Supreme Court, Order 9 rule 15;

(iii) it shows that service was not effected personally by the deponent contrary to Rules of the Supreme Court, Order 9 rule 2;

(iv) it does not mention that at the time of the alleged service the writ and the copy thereof were subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Court;

(v) it does not mention the date of the writ."

The said rules read as follows:—

Order 13 rule 2.

"Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order, or under Order 15, rule 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be."

Order 67 rule 9.

"Affidavits of service shall state when, where, and how and by whom, such service was effected."

Order 9 rule 2.

"When service is required the writ shall, wherever it is practicable, be served by handing to the defendant a copy of the writ and showing to him the original writ if so requested, but if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just."

Order 9 rule 15.

"The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made. This rule shall apply to substituted as well as other service."

The following authorities were cited by Mr. Joseph for the defendant in support of the point that where the law provides a particular method or form of procedure for effecting service, then there must be strict compliance with those provisions:— (1) *Halsbury*, 3rd edn., vol. 22 p. 788; (2) *White Book* 1957, p. 152; (3) *Hamp-Adams* v. *Hall* [1]; (4) *MacFoy* v. *United Africa Co. Ltd.*[2] It was also submitted for the defendant on the authority of *Craig* v. *Kanseen* [3] that the failure to comply with Order 13 rule 2 renders the subsequent proceedings a nullity and not a mere irregularity which is curable.

If the plaintiff's affidavit is to be treated as the affidavit of service, then certainly there has been no compliance with Order 13 rule 2.

Whether the authorities cited are applicable will of course depend upon the particular facts of this case which can be seen in proper perspective if the following considerations are borne in mind. In the High Court in England the responsibility of ensuring due service of the writ or other originating process on the defendant lies upon the plaintiff who may effect such service either by himself or, as is much more usual, by his agent. (See *White Book* 1965, volume 1, page 92). There is no official process server such as the court process server in this country. Here, although service of the writ may be effected by the plaintiff himself, in most cases this is done through the court process server. The fee payable to effect service is $1. (See Third Schedule (Order 73) Fees in the Supreme Court — item 102). After service, the affidavit of service is then filed by the process server. No fee is however payable on the taking of such affidavit or the filing thereof — see the proviso to item 102 and item 70.

It will be seen from the writ in this suit that in addition to the fee of $10 for the writ itself, an additional fee of $1 had been paid for the service and taking and filing of the affidavit of service by the process server, the service was effected on the defendant by the court process server on 3rd January, 1959, and the affidavit of service was then filed. This affidavit is as follows:—

"I, Shaharin bin Kassan process server of the Supreme Court, Seremban, do solemnly affirm as follows:—

1. That I did on the 3rd day of January, 1959, at 9.25 o'clock in the forenoon at No. 7, Carew Street, Seremban, serve this writ of summons now produced and shown to me and marked '1' by serving a copy of this writ of summons on the defendant, Lee Poh Soo, at No. 7, Carew Street, Seremban, who admitted to me that he was the person named therein.

2. That I did afterwards on the 3rd day of January, 1959, endorse the said writ of summons marked '1' the day of the week and month of such service."

It is clear from this affidavit that all the relevant rules, *viz.* Order 67 rule 9, Order 9 rule 2, Order 9 rule 15, have been complied with, and therefore a proper affidavit of service had been filed. The omission to mention the date of the writ and the fact that at the time of the service the writ and copy thereof were subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Court does not contravene any rule of the Supreme Court. It does not appear to me that anything more was required of the plaintiffs except perhaps to swear an affidavit referring to the filing of the affidavit of service by the process server. In the present case, the plaintiffs' affidavit makes such reference. It is true that in the last paragraph thereof it is stated that the plaintiffs' own affidavit may be treated as the affidavit of service, but to my mind this is a redundancy and does not detract from the position that before entering final judgment there was a proper affidavit of service. I therefore find that this judgment was obtained regularly.

In the alternative, the defendant says that assuming there was a regular judgment, he has a good defence on the merits in that the transactions, the subject-matter of the suit were not real contracts for the sale of rubber, but were transactions to enable him to gamble in differences and that therefore such transactions were null and void and unenforceable under section 26 of the Civil Law Ordinance, 1956.

It was decided in *Evans* v. *Bartlam*,[4] that in an application to set aside a judgment obtained

regularly there must be an affidavit of merits. In the present case, if the subject-matter of the suit were gambling transactions then that would be a *prima facie* defence. The power to set aside a regular judgment however is discretionary and in exercising its discretion the court may, apart from the question of merits, consider the conduct of a defendant, *viz.*, whether he has been guilty of laches in making the application and his explanation, if any, as to why he neglected to appear after having been served and why he allowed the judgment to be regularly obtained. (See judgment of Lord Wright in the above case). I am aware of the case of *Attwood* v. *Chichester*,(5) often cited as the authority for the view that lapse of time is no bar to an application to set aside a default judgment, but this proposition seems to me to be subject to this qualification, *viz.*, that the conduct of the defendant should be *bona fide*. In that case a default judgment against a married woman was set aside about a year after it was signed. The defendant had a good defence but the objection of lateness did not prevail as she had not acted *mala fide*. Bramwell L.J. said at page 724:—

"But then has her conduct been *bona fide*? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed?

And in the same case Brett L.J. said at page 724:—

"From the facts, before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. . . . . Now, if it could have been shewn that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was."

As one operating the business of a rubber dealer, it is difficult to see how the defendant could plead ignorance of the nature and purpose of the writ with which he was served and the result of any default in attending to it. He has given no reason why he omitted to appear at the proper time or why he allowed the judgment to be regularly obtained instead of putting up a defence such as that now shown in his affidavit, and he has certainly not improved his position by making payments to the plaintiffs towards his judgment debt amounting in all to a sum of $8,150. It was only after six years from the date of judgment that he thought of bestirring himself at all, and that too when he was served with a bankruptcy notice. I find that the defendant has been guilty of laches and that his conduct has not been *bona fide*.

For these reasons I dismiss the application with costs.

Application dismissed.

Solicitors: *Lee Boon Peng; Joseph & Son.*

CHEW KONG KAH v. CHEU KUAN CHENG

[O.C.J. (Raja Azlan Shah J.) October 10, 1966]

[K.L. — Civil Suit No. 453 of 1964]

Practice and Procedure — Consent order agreed to by counsel — Party applying to set aside order before it was drawn up and perfected — Jurisdiction of the court.

The plaintiff applied to set aside a consent order which had been consented to by his counsel. The consent order had not been drawn up and perfected and it was alleged that the counsel gave his consent under a misapprehension.

Held: as the consent order had not been drawn up and perfected in this case, and as there appeared to be some misapprehension on the part of counsel the application to set aside the order will be granted and the case restored to the hearing list.

Cases referred to:—

(1) *Holt* v. *Jesse* (1876), 3 Ch. D. 177.

(2) *Neale* v. *Gordon-Lennox* [1902] A.C. 465.

(3) *Shepherd* v. *Robinson* [1919] 1 K.B. 474.

(4) *Strauss* v. *Francis* L.R. 1 Q.B. 379.

(5) *Matthews* v. *Munster* (1887), 20 Q.B.D. 141.

(6) *Welsh* v. *Roe* (1918), 87 L.J. (K.B.) 520.

(7) *Dietz* v. *Lenning Chemicals Ltd.* [1966] 2 All E.R. 962, 964.

(8) *Little* v. *Spreadbury* [1910] 2 K.B.D. 658.

CIVIL SUIT.

Peter Yeo for the plaintiff.

Morris Edgar for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: This case came on for hearing on February 18, 1966 and was adjourned for further hearing to June 1, 1966. The plaintiff claims for a declaration that both he and the defendant are partners in equal shares in the ownership of a cinema hall, an order that the partnership be dissolved and the affairs be wound up by the court, for the appointment of a receiver and manager and the taking of accounts, and damages. The defendant alleges that the plaintiff held only one-third share in the partnership. At the resumed hearing the case was settled in chambers in the presence of both counsel but without the parties being present. Before the consent order was drawn up and perfected, the plaintiff, on being told of the terms of the settlement, immediately notified the registrar and counsel for the defendant of his intention to apply to set aside the consent order and the case to be restored to the hearing list. He accordingly filed his application by way of motion. The following facts appeared from the affidavit filed by the plaintiff.